KWAN KWOK KWONG & ANOR

v.

TRENOLO RESOURCES SDN BHD

HIGH COURT MALAYA, MUAR
JEFFREY TAN J
[ORIGINATING MOTION NO: 24(L) 709-1999]
29 JUNE 2000

LAND LAW: *Housing developers - Sale and purchase agreement - Land subject to encumbrance - Whether land "discharged" from encumbrance upon payment of full purchase price*

By an agreement, the defendant sold and the plaintiffs purchased a commercial unit. The plaintiff had fully paid up the purchase price to the defendant but the defendant had failed to discharge the land.

The agreed issue to be resolved is whether the provisions of the sale and purchase agreement permit the defendant to use and/or encumber the subject property purchased by the plaintiffs until the issuance of the strata title to the subject property or only until full payment of the purchase price.

Held:

[1] Looking at the agreement as a whole, it was the intention of the parties, in the case of the defendant to liquidate the said parcel for money, and in the case of the plaintiffs to exchange money for the said parcel.

[2] As a rule, a vendor of immovable property free from encumbrances is obliged, immediately upon his receipt of the full purchase price from the purchaser, to convey the full benefits of both the legal and beneficial ownership of the immovable property to the purchaser. Among other things, that vendor is obliged to execute and deliver a good and registrable memorandum of transfer of the immovable property free from encumbrances together with the document of title to the purchaser. The duty is the same even though the strata title to the property was not issued yet.

[3] Clauses 13 and 23 were intended to protect the defendant from liability for any official delay in the issuance of strata title occasioned by the issuing authority but not to shield the defendant from liability for their own delay.

[4] Though the plaintiffs gave their consent to the creation of land charges by the defendant, it is subject to the defendant's agreement to deliver the subject property free from all emcumbrances other than those imposed by the provisions of the agreement and the conditions expressed and implied in the separate strata title when issued.

[5] Hence, the plaintiffs purchased the property free from land charges and the defendant must redeem the said property for them. The execution of a valid and registrable memorandum of transfer was agreed to be deferred until the issuance of a document of title. Any existing encumbrance could be "discharged" even without a document of title.

[6] The provisions of the agreement do not permit the defendant to use and/or encumber the said parcel until the issuance of the strata title but only until full payment of the purchase price.

[Judgment for the plaintiff with costs.]

Case(s) referred to:

Aspdin v. Austin [1844] 5 QB 671 ***(refd)***
BP Refinery (Westernport) Pty Ltd v. Shire of Hastings [1978] 52 AJLR 20 ***(refd)***
Chamber Colliery Ltd v. Twyerould (1893) [1915] 1 Ch 268 ***(refd)***
Chatenay v. The Brazilian Submarine Telegraph Co Ltd [1891] 1 QB 79 ***(refd)***
Churchward v. R [1865] LR 1 QB 173 ***(refd)***
Datuk Yap Pak Keong v. Sababumi (Sandakan) Sdn Bhd [1997] 1 CLJ 23 ***(refd)***
Duke of Westminster v. Guild [1985] QB 688 ***(refd)***
Equity & Law Life Assurance Society plc v. Bodfield Ltd [1987] 281 EG 1448 ***(refd)***
Great Western Railway v. Bristol Corp [1918] 87 LJ Ch 414 ***(refd)***
Grey v. Pearson [1857] 6 HL Cas 61 ***(refd)***
Hudson v. Buck [1877] 7 Ch D 683 ***(refd)***
Ipswich Diocesan Board of Finance v. Clark (No 2) [1975] 1 WLR 468 ***(refd)***
James Miller and Partners Ltd v. Whitworth Street Estates (Manchester) Ltd [1970] AC 583 ***(refd)***
Kam Mah Theatre Sdn Bhd v. Tan Lay Soon [1994] 1 CLJ 1 ***(refd)***
Leader v. Duffey [1888] 13 App Cas 298 ***(refd)***
Luxor (Eastborne) Ltd v. Cooper [1941] AC 108 ***(refd)***
Lynch v. Thorne [1956] 1 WLR 303 ***(refd)***

Mackay v. Dick [1881] 6 App Cas 251 ***(refd)***
Pioneer Shipping Lyd v. BTP Tioxide Ltd [1982] AC 724 ***(refd)***
Re Jodrell [1890] 44 Ch 590 ***(refd)***
Re Strand Music Hall Co Ltd [1895] 35 Beav 153 ***(refd)***
Reardon-Smith Line Ltd v. Hansen-Tangen [1976] 1 WLR 989 ***(refd)***
Robertson v. French [1803] 4 East 130 ***(refd)***
SA Maritime et Commerciale of Geneva v. Anglo-Iranian Oils Co Ltd [1954] 1 WLR 492 ***(refd)***
Shell UK Ltd v. Lostock Garage Ltd [1976] 1 WLR 1187 ***(refd)***
Shirlaw v. Southern Foundries (1926) Ltd [1939] 2 KB 206 ***(refd)***
Smith v. Cooke [1891] AC 297 ***(refd)***
SPA v. Tradax Ocean Transportation [1987] All ER 81 ***(refd)***
Stirling v. Maitland [1864] 5 B&S 841 ***(refd)***
The Moorcock [1889] 14 PD 64 ***(refd)***
Young and Marten Ltd v. McManus Childs Ltd [1969] 1 AC 454 ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 32, 33
Strata Titles Act 1985, s. 10

Other source(s) referred to:
Teo Keang Sood & Khaw Lake Tee, *Land Law in Malaysia, Cases and Commentary*, 2nd edn, pp 202-203
Visu Sinnadurai, *Sale and Purchase of Real Property in Malaysia*, p 186

For the plaintiff - Lim Hwah Beng; M/s HB Lim & Assocs
For the defendant - Allen Yu; M/s Allen Yu Chin Aun & Assocs

Reported by Yow Ting Fong

JUDGMENT

Jeffrey Tan J:

After submissions by learned counsel, this has now become the plaintiffs' application, by this originating summons (encl. 2) dated 20 November 1999, for the court's adjudication on the following agreed issue:

> Whether the provisions of the agreement dated 1.6.1995 between the Plaintiffs and Defendant, and in particular clauses 1, 13, 15, 20 and 23, permit the Defendant to use and or encumber the subject property purchased by the Plaintiffs from the Defendant until the issuance of the strata title to the subject property or only until full payment of the purchase price.

The background facts, narrated by Mr Lim Hwah Beng for the plaintiffs and then most affably confirmed by Mr Allen Yu for the Defendant, may be rephrased as follows. By an agreement (agreement) dated 1 June 1995 and entered into between the defendant as vendor of the one part and the

plaintiffs as purchasers of the other part, the defendant sold and the plaintiffs purchased a commercial unit (hereinafter referred to as the said parcel) known as parcel No. 59, Storey 1 contained in a commercial complex known as Wira Court now erected on land known HS (D) 16797 PTD 10039 Mukim of Simpang Kanan, District of Batu Pahat (hereinafter referred to as the said land). By 18 December 1996, the plaintiffs had fully paid up the purchase price (RM258,432). Hitherto, the said land was charged already to the United Merchant Finance Berhad (UMFB). The said land is still charged to UMFB. Presently, Pengurusan Danaharta Nasional Berhad has acquired the rights of UMFB. A strata title in respect of the said Parcel is yet to be issued.

Mr Lim contented that the defendant, because of their failure to discharge the parcel, had breached the agreement and therefore entitled the plaintiffs in turn to terminate the agreement. In the affidavit (encl. 5) affirmed on their behalf, "the defendant admitted that they had cash flow problems and that the unit is still encumbered". "The defendant pleaded that they would try to resolve their financial problems." "However", Mr Lim added, "the defendant did not say that they would obtain a release of the parcel". Mr Lim further contended that the defendant must give all rights and all benefits of ownership of the said parcel to the plaintiff. "The strata title can wait, but all other rights must be handed over." "The underlying purpose of cl. 15 of the agreement was only bridging finance." Disagreeing with the defendant who contended in para. 12 of encl. 5 that cl. 15 permitted the defendant to utilise the said parcel as a loan security until the issuance of the strata title to the unit, Mr Lim added that cl. 15 only permitted the said parcel to be encumbered during the period of construction, and whilst the purchase price was still not fully paid.

In his short submission, Mr Yu contended that the clauses of the agreement cannot be enforced, because ss. 32 and 33 of the Contracts Act 1950 provide that a contingent contract to do or not do anything if an uncertain event happens cannot be enforced by law unless and until that event has happened, and not before. Then referring to s. 10 of the Strata Titles Act 1985, Mr Yu said that strata titles could be applied, albeit that there is a charge. Mr Lim replied that strata titles would not be obtained, so long as there is a charge.

Obviously, to rule on the agreed issue, this court is required to interpret or construct the agreement.

The process of interpretation starts by a consideration of the language used by the parties in the document itself, to ascertain the meaning of the words in the document and to determine (subject to any rule of law) the legal effect or the effect to be given to those words (See *Chatenay v. The Brazilian Submarine Telegraph Co., Ltd.* [1891] 1 QE 79, so as to ascertain further "... the mutual intentions of the parties ... as to the legal obligations each assumed by the contractual words in which they sought to express them ... ." (*Pioneer Shipping Lyd. v. B.T.P. Tioxide Ltd* [1982] AC 724 per Lord Diplock). The intention of parties is strictly the meaning of the words they have used. "The suggestion of an intention of parties different from the meaning conveyed by the words employed is no part of interpretation, but is mere confusion" *Great Western Railway v. Bristol Corporation* [1918] 87 LJ Ch 414 per Lord Shaw. Thus, in *Re Jodrell* [1890] 44 Ch 590, Lord Halsbury said:

> I do not know what the testator meant except by the words he has used ... . For myself, I am prepared to look at the instrument such as it is; to see the language that is used in it; to look at the whole of the document and not to part of it; and having looked at the whole of the document to see, if I can, through the document what was in the mind of the testator. Those are general principles for the construction of all instruments and to that extent it may be said that they are canons of construction.

The language used must be considered in the light of the surrounding circumstances and the objects of the contract, in so far as it has been agreed or proved. But it would be erroneous to assume an intention apart from the language used in the instrument and bend the language in favour of the assumed intention (*Leader v. Duffey* [1888] 13 App. Cas. 298, "to construe an instrument contrary to what the words of the instrument itself convey" (*Smith v. Cooke* [1891] AC 297 per Lord Halsbury), "to introduce uncertainty by starting from the viewpoint of a general rule governing such clauses, and then to resolve the question of construction by reference to it ... (as it is) the court's task is to determine the meaning of the provision, against its contractual and contextual sense" (*S.P.A. v. Tradax Ocean Transportation* [1987] All ER 81), or "to construe and apply not the clause which the parties have entered into but the different clause which they might have ... entered into." (*Equity & Law Life Assurance Society plc v. Bodfield Ltd* [1987] 281 EG 1448).

In attempting to ascertain the presumed intention of the parties, the court will adopt an objective approach, that is to say that it will consider what would have been the intention of reasonable persons in the position of the actual parties to the contract. Thus in *Reardon-Smith Line Ltd v. Hansen-Tangen* [1976] 1 WLR 989, Lord Wilberforce said:

> When one speaks of the intention of the parties to the contract one speaks objectively – the parties cannot themselves give direct evidence of what their intention was – and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties.

The court is entitled to look at evidence of the actual factual background known to the parties at or before the date of the contract; accordingly, evidence of the surrounding circumstances (*Kam Mah Theatre Sdn. Bhd. v. Tan Lay Soon* [1994] 1 CLJ 1), of the "genesis" and of the "aim" of the transaction, limited however to objective facts, to place the contract in its correct setting – the factual matrix – is admissible. Thus in *Ipswich Diocesan Board of Finance v. Clark (No. 2)* [1975] 1 WLR 468, Sir John Pennycuick, delivering the judgment of the English Court of Appeal, said:

> It is no doubt true that in order to construe an instrument one looks first at the instrument and no doubt one may form a preliminary impression on such inspection. But it is not until one has considered the instrument and the surrounding circumstances in conjunction that one concludes the process of construction.

However, the court may not look at the subsequent conduct of the parties to interpret a written contract unless that conduct amounted to a variation of the contract or gave rise to an estoppel (*James Miller and Partners Ltd. v. Whitworth Street Estates (Manchester) Ltd* [1970] AC 583.)

Words are construed, in their grammatical and ordinary sense, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense may be modified, so as to avoid that absurdity and inconsistency, but no further (*Grey v. Pearson* [1857] 6 HL Cas 61 per Lord Wensleydale); the ordinary meaning of a word is its meaning in its plain, ordinary and popular sense, unless the context points out some special and particular sense (*Robertson v. French* [1803] 4 East 130). In the case of a word with both an ordinary and a specialised meaning, the popular meaning will prevail unless it is proved first that the parties intended to use the word in the specialised sense.

There is a general presumption against implying terms into written contracts. Rather, the presumption is that parties who have entered into written engagements with written stipulations have expressed all the conditions by which they intended to be bound under the instrument (*Aspdin v. Austin* [1844] 5 QB 671; *Luxor (Eastborne) Ltd v. Cooper* [1941] AC 108) and care must be taken not to make a contract speak where it was intentionally silent (*Churchward v. R* [1865] LR 1 QB 173). The presumption against adding terms is stronger where the contract is a written contract which represents an apparently complete bargain (*Duke of Westminster v. Guild* [1985] QB 688).

Where the bargain is obviously not complete, the court may imply the missing terms if the following criteria (some of which may overlap) set by Lord Simon of Glaisdale in *B.P. Refinery (Westernport) Pty. Ltd v. Shire of Hastings* [1978] 52 AJLR 20 are fulfilled:

(i) if it is reasonable (*Young and Marten Ltd v. McManus Childs Ltd* [1969] 1 AC 454) and equitable (*B.P Refinery (Westernport) Pty. Ltd v. Shire of Hastings* [1978] 52 AJLR 20),

(ii) if it is necessary to give business efficacy to the contract (*The Moorcock* [1889] 14 PD 64),

(iii) if it is obvious *(Shirlaw v. Southern Foundries* (1926) Ltd [1939] 2 KB 206),

(iv) if it is capable of clear expression (*Shell U.K. Ltd v. Lostock Garage Ltd* [1976] 1 WLR 1187); and

(v) if it is not inconsistent with the express terms of the contract or its general tenor (*Lynch v. Thorne* [1956] 1 WLR 303).

A court, subject to the qualification that there is absent a contrary intention, would be more ready to imply a term in cases "where a special relationship such as those recognised by the law exists" (eg, banker and client, employer and employee, principal and agent, vendor and purchaser of immovable property, landlord and tenant) than in cases where no such special relationship exsists, "in order to make the particular relationship workable" (*Datuk Yap Pak Keong v. Sababumi (Sandakan) Sdn. Bhd.* [1997] 1 CLJ 23 at p. 54, per Gopal Sri Ram JCA).

In general, a term is necessarily implied in a contract that neither party shall actively prevent the other from performing it, which itself is a breach of the contract. The classic formulation of that implied term is that of Cockburn CJ in *Stirling v. Maitland* [1864] 5 B&S 841:

> I look on the law to be that if a party enters into an arrangement which can only take effect by reason of the continuance of a certain state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone that arrangement can be operative.

There is also imposed on parties a general duty to co-operate in the performance of a contract. The duty includes a duty not to prevent the fulfilment of conditions (see *Mackay v. Dick* [1881] 6 App. Cas 251, where the buyer refused to give a machine a proper trial, and the House of Lords held it was a breach of contract) and to act *bona fide* (perhaps reasonably), where the condition to be fulfilled is one which is dependent on the discretion of one party to the contract, to procure the fulfilment of the condition (*Hudson v. Buck* [1877] 7 Ch. D. 683).

To arrive at the true interpretation of a document, a clause must not be read in isolation, but must be considered in the context of the whole of the document (*Chamber Colliery Ltd v. Twyerould* (1893) [1915] 1 Ch 268; *Re: Jodrell (supra)*). As a corollary of the principle that a document must be construed as a whole, all parts of it must be given effect where possible (*Re Strand Music Hall Co. Ltd* [1895] 35 Beav 153) and no part of it should be treated as inoperative or surplus (*S.A. Maritime et Commerciale of Geneva v. Anglo-Iranian Oil Co. Ltd* [1954] 1 WLR 492) unless it is impossible to reconcile it with another and more express clause in the same deed (*Re Strand Music Hall Co. Ltd (supra)*).

But the two most important and comprehensive rules of general application in construing a written instrument are: (i) that it shall, if possible, be so interpreted *ut res valeat potius quam pereat,* and, (ii) that such a meaning shall be given to it as to carry out and effectuate to the fullest extent the intention of the parties. Put together, *benigne faciendae sunt interpretationes ut res magis valeat quam pereat*, the rule is that a liberal construction should be put upon written instruments, so as to uphold them, if possible, and carry into effect the intention of the parties. Every document ought to be construed, if possible, so as to make it operative. "It boils down to this. Where a contract is couched in unambiguous language, the court must give effect to it. But where the terms of a contract are ambiguous then the court may imply a term in order to uphold the transaction" (*Datuk Yap Pak Leong v. Sababumi (supra)* at p. 53 per Gopal Sri Ram JCA).

The pertinent clauses, so it was agreed, of the agreement, read as follows:

Clause 1 – Sale And Purchase Of Property

The Vendor hereby agrees to sell and the Purchaser hereby agrees to purchase the said Parcel free of all encumbrances other than those imposed by the provisions of the Agreement and the conditions expressed and implied in the separate strata title to the said Parcel when issued, subject to the terms and conditions hereinafter contained and the special conditions (if any) contained in the Fourth Schedule hereto.

Clause 13 - Issue Document Of Title

The Vendor shall at its own costs and expense obtain issue of a separate strata title to the said Parcel but any delay in obtaining such separate strata title shall not be a ground for any delay by the Purchaser in the payment on due dates of any of the instalments of the Purchase Price set out in the Third Schedule Hereto and the interest thereon (if any) and the Vendor shall not in any way be liable to the Purchase for any loss, damages cost, fee or expenses howsoever arising or incurred due to any delay in the issue of the separate strata title to the said to Parcel.

Clause 15 - Consent To Encumber

(1) The Purchaser hereby do irrevocably consent that the Vendor may charge or in anyway encumber the said Parcel provided always that nothing shall release the Vendor of its obligations to transfer the said Parcel free of all registrable encumbrances in accordance with Clause 1 of this Agreement.

(2) The Purchaser shall not encumber the said Parcel including the lodging or the causing of the lodging of a caveat on the said land or any part thereof in default of which the Purchaser shall indemnify and keep safe the Vendor against any costs, fees, expenses, damages, claims proceedings, demands or actions arising therefrom.

Clause 20 - Delivery Of Vacant Possession

Subject to Clause 31 hereof or of any delay by whatsoever reasons owing to the Purchaser and provided always that the Purchaser shall have paid to the Vendor all instalments and monies payable under this agreement as and when they become due, the said Parcel shall be completed by the Vendor and vacant possession shall be handed over to the Purchaser within thirty-six (36) months from the date of this agreement and if the Parcel is not completed and ready for delivery of vacant possession to the Purchaser agreed liquidated damages calculated from day to day at the rate of ten per cent (10%) per annum on such part of the Purchase Price of the said Parcel as

shall have been paid to the Vendor from such date of expiry of the said thirty-six (36) months to the date of actual completion and delivery of vacant possession of the said Parcel to the purchaser shall be paid by the Vendor.

Clause 23 - Transfer of Parcel

The Vendor shall upon the issuance of the document of title to the said Parcel and provided that the Purchaser shall have paid all monies under clause 3 hereof in accordance with the Third Schedule Hereto and all interest and all other monies whatsoever due under this Agreement and shall have performed and observed all the terms and conditions of this agreement, execute a valid and registrable transfer of the said Parcel in favour of the Purchaser his heir or permitted lawful assignee, as the case may be, free from all encumbrances other than those imposed by the provisions of this Agreement and the conditions expressed and implied in the separate strata title to the said Parcel.

Looking at the agreement as a whole, it is most evident that the intention of the plaintiffs was to buy whilst the intention of the defendant was to sell the said parcel. Put differently, it was the intention of the parties, in the case of the defendant to liquidate the said parcel for money, and in the case of the plaintiffs to exchange money for the said parcel. That mutual exchange was at the heart and soul of the bargain. And all provisions of the agreement functioned, so it must be, to implement and to see through that bargain. The provisions of the agreement, or any of them, were not there to defeat that bargain. For it is just not logical that there could be an agreement to break the very same agreement. As said, the provisions of the agreement must be read *ut res valeat potius quam pereat,* to uphold the bargain, if possible, and to carry into effect and not defeat the bargain.

Essentially, the sum total of the contractual obligation of the plaintiffs was to pay the full purchase price. And that, it was agreed, the plaintiffs had performed.

"Where a purchaser under a contract of sale had paid the full purchase price and entered into possession of the land under an expectancy of title, the courts have held that the purchaser was the equitable owner of the land whose rights as against the vendor to have the full title to the land formally transferred to him could not be lost by reason of mere delay or laches" (Teo Keang Sood and Khaw Lake Tee, *Land Law in Malaysia, Cases and Commentary* 2nd edn pp. 202-203). As a rule, that is unless otherwise provided, a vendor of immovable property free from encumbrances is obliged, immediately upon his receipt of the full purchase price from the purchaser, to convey the full benefits of both the legal and beneficial ownership of the immovable property to the purchaser. *Inter alia,*

that vendor is obliged to execute and deliver a good and registrable memorandum of transfer of the immovable property free from encumbrances together with the document of title to the purchaser. Indeed, "one of the main obligations of a vendor under a contract for the sale of land is to give a purchaser a title 'free from all encumbrances'. The effect of such an obligation is to ensure that the purchaser on registration, acquires a title with no existing encumbrances which would in any way fetter the purchaser's right to deal with the land subsequently or which would affect the purchaser's enjoyment of the land" (*Sale and Purchase of Real Property in Malaysia* by Visu Sinnadurai at p. 186). "A vendor is under a general duty to deliver a title free from all encumbrances on the date for completion and not on the date the contract was entered into. It is therefore, quite possible for a vendor to deal with the land during this interim period with the understanding that any such encumbrance on the land would be discharged on the date for completion" (*Sale and Purchase of Real Property in Malaysia ibid* at p. 187). And it was no different in the present case, although the strata title was yet not issued.

Now the plaintiffs entered into the agreement knowing fully well, for the 2nd and 4th recitals to the agreement disclosed so, that the said land was already charged and that the strata title to one the parcel was yet to be applied, and therefore nowhere near yet to be issued. However, the plaintiffs were required, by cl. 3 of the agreement, to pay the purchase price in accordance with the completed stages of construction of the said parcel, whilst the defendant was committed (cl. 20) to complete and deliver vacant possession of the said parcel to the plaintiffs within 36 months. Both parties agreed, in other words, that 36 months from the execution of the agreement shall be the date for completion. But the matter of the issuance of a strata title, even if applied for, was not a matter within the defendant's control. And it could end up with the defendant not being able, in spite of all efforts to obtain a strata title, to deliver the strata title to the plaintiffs within those 36 months. For that reason, cl. 13 provided that "any delay in obtaining such separate strata title shall not be a ground for any delay by the purchaser in the payment on due dates of any of the instalments of the purchase price set out in the Third Schedule hereto and the interest thereon (if any) and the vendor shall not in any way be liable to the purchaser for any loss, damages cost, fee or expenses howsoever arising or incurred due to any delay in the issue of the separate strata title to the said parcel". Also for that reason, cl. 23 provided that the defendants shall execute a valid and registrable transfer of the said parcel "upon the issuance of the document of title to the said parcel". And given the reality that the issuing authority might indeed delay the issuance of a strata title,

it was just fair to provide so. Clearly, cls. 13 and 23 were intended to protect the defendant from liability for any official delay in the issuance of the strata title occasioned by the issuing authority. Clauses 13 and 23 were not intended to shield the defendant from liability for their own delay. Undoubtedly, if there was a document of title, cl. 13 would not have been required, and cl. 23 would not read as in the present form. Rather, just as in cases of all dealings with document of titles, cl. 23 should read, to the effect, that the Defendant shall execute a valid and registrable transfer of the said Parcel upon full payment of the purchase price. Plainly, cls. 13 and 23 were so phrased, only to deal with the one particular circumstance – that there was no document of title. Clauses 13 and 23 were not to provide for an encumbrance created by the defendant until the issuance of a document of title. Reasonably, that must be the construction of cls. 13 and 23.

Granted, the paintiffs gave their consent, in the 1st limb of cl. 15(1) of the agreement, to the creation of late charges by the defendant. But that consent was not without condition. The rider to the 1st limb of cl. 15(1) states, "Provided always that nothing shall release the (defendant) of its obligations to transfer the said parcel free of all registrable encumbrances in accordance with cl. 1 of this agreement". The agreement says, in clear and unambiguous languange in cl. 1 of the agreement, that the defendant agrees to sell and the plaintiff agree to purchase the said parcel free of all encumbrances (meaning charges, caveats or other adverse claims) other that those imposed by the provisions of the agreement (meaning the covenants of the purchasers, common rights and liabilities, and like provisions) and the conditions expressed and implied in the separate strata title to the said parcel when issued (meaning the express conditions and restrictions of interest imposed by the State Authority or by the National Land Code itself) subject to the terms and conditions hereinafter contained and the special conditions (if any) contained in the Fourth Schedule hereto (meaning the position and area of the said parcel). The agreement says, in cl. 23 of the agreement, that the defendant "shall execute a valid and registrable transfer of the said parcel ... free from all encumbrances other than those imposed by the provisions of this agreement and the conditions expressed and implied in the separate strata title to the said parcel." Unquestionably, the plaintiffs purchased the said parcel free from land charges. Beyond question, the defendant must redeem the said parcel for the plaintiffs. Just the execution of a valid and registrable memorandum of transfer was agreed to be deferred, until the issuance of a document of title. Only the formal transfer was deferred. Without a document of title, that was probably the only solution. But other than formal registration, the

plaintiffs were entitled, upon payment of the full purchace price, to the full benefits of both the legal and beneficial ownership of the said parcel. And the exsisting encumbrance which could render the plaintiffs' legal and beneficial ownership effectively or substantially worthless could be "discharged", unlike the formal registration of the plaintiffs' title, even without a document of title.

Without doubt, the provisions of the agreement do not permit the defendant to use and or encumber the said parcel until the issuance of the strata title, only until full payment of the purchase price. Lastly, costs of this application is ordered, since the agreed issue is being answered in favour of the plaintiff, by the defendant.